duct apparently bearing no relation to the abnormality is entirely disconnected from it. If capacity for crime were not so narrowly defined—knowledge of the difference between right and wrong—there would be less scope for the practical operation of the logical antithesis between the capacity for crime and the capacity for making a defense.

G. W. W.

CRIMINAL LAW: INTERSTATE EXTRADITION.—Looking at the subject of extradition historically it is significant to note that all efforts to extend the power indiscriminately to new situations and new classes of cases have been stubbornly opposed both in England and in this country.[1] The principle underlying this opposition arises from considerations of public policy and from the nature of extradition proceedings. If the extradition papers set out all the elements of a crime, known to the law of the demanding state and there charged against the person, plus flight from that state, and then the governor honors the requisition,[2] the courts are powerless to interfere.[3] It is because of this absolutism of the extradition power, it is because a person may be transported to the utmost confines of the country without a trial on the merits of the case, that the rule of strict construction is applied,[4] that the courts have so jealously guarded, and must continue so to guard the right of a person sought to be extradited.

In 1908 Harry Thaw on trial in New York for an alleged murder was acquitted by a jury on the ground of insanity; and as a result of this finding of insanity he was confined in the state institution for the insane. While so confined he escaped into New Hampshire; the governor of that state honored the requisition for Thaw's return to New York and the present writ of habeas corpus is brought to resist extradition.

Son in *Ex parte Thaw*[5] we have the novel case—new to the jurisprudence of both England and America—of a person sought to be extradited because he has fled from guardianship custody based upon the verdict of a jury that he was insane. Does such a case satisfy the legal requirements of extradition? As pointed out above, one of these legal requirements consists in setting out the elements of a crime. Now we know the necessary elements of a crime to be an act and an intent;[6] but the very fact

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[1] 3 Centr. L. J. 636; 2 Moore's Extradition, § 585; 6 & 7 Vict., c. 34, p. 194; 4 N. Y. Cr. R. 601; Lunacy Act of 1890, 53 Vict., c. 5, §§ 86, 89, in which England provided other means than extradition for the return of escaped lunatics upon a charge of crime.

[2] Kentucky v. Dennison (1860), 24 How. 66, 16 L. Ed. 717 (the governor cannot be compelled to grant extradition).

[3] Roberts v. Reilly (1885), 116 U. S. 80, 29 L. Ed. 544, 6 Sup. Ct. Rep. 291; In re Strauss (1903), 126 Fed. 327, 63 C. C. A. 99.

[4] Ex parte Slauson (1896), 73 Fed. 666.

[5] (April 14, 1914), 214 Fed. 423 (now on appeal to the Supreme Court of the United States).

[6] Bishop's New Criminal Law, § 206.

of custody based on insanity negatives, at least prima facie, the presence of the element of intent. Therefore it would seem to follow that a crime has not been legally and substantially set forth, and that the court correctly stays the extradition proceedings where the extradition papers themselves show the mental irresponsibility of the person.

The only question before the court was extradition or no extradition. But query: if New York had given evidence of its status as guardian under the *parens patriae* doctrine, and evidence of the ward's escape, and sought return, not upon the ground that Thaw was a criminal but that he was a ward subject to guardianship control, would not New Hampshire in that case have surrendered him up as a matter of comity? The tendency of modern decisions is to recognize, as a matter of comity, the rights of foreign guardians in respect of the persons of their wards;[7] and in many cases the courts have awarded custody of the ward's person to foreign guardians, with right of removal to the state from which guardianship control emanates.[8] The courts have almost uniformly made the welfare of the ward the sole controlling factor in determining whether to recognize a foreign guardianship—thus considering it their duty to give effect to the principle of comity in all cases where the well being of the ward does not interfere.[9]

So it would seem that the proper proceeding on the part of New York should have been something like this: attempt to retake the person of Thaw, there being no liability for false imprisonment for such an act;[10] but if this were unsuccessful, petition the proper court for an adjudication of Thaw's present insanity, and on the basis of this adjudication ask for the recognition of the guardianship status in New York. In such a proceeding, the question before the court would not have been whether the executive acted within his strict legal rights, but whether in the sound discretion of the judicial department alone, guided by considerations of the ward's well-being, the recognition of the foreign guardianship was justified.

J. C. A.

CRIMINAL LAW: OYSTERS AS SUBJECTS OF LARCENCY: RESERVATION OF OYSTER LANDS.—Common-law analogy afforded by growing vegetation, or, perhaps as readily, by stones or pebbles, might easily have induced the courts to regard the lowly oyster as a part of the freehold whereon it lived. However, it is judici-

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[7] Woodworth v. Spring (1862), 4 Allen 321; Hanrahan v. Sears (1903), 72 N. H. 71, 54 Atl. 702.

[8] Taylor v. Jeter (1862), 33 Ga. 195, 81 Am. Dec. 202; Grimes v. Butsch (1895), 142 Ind. 113, 41 N. E. 328; Nugent v. Vetzera (1866), L. R. 2 Eq. 704, 12 Jur. (N. S.) 781, 35 L. J. Ch. 777, 15 L. T R. (N. S.) 33.

[9] Woodworth v. Spring, supra, note 7, at p. 325.

[10] Townsend v. Kendall (1860), 4 Minn. 412, 77 Am. Dec. 534.